

**FINAL WRITTEN ARGUMENTS OF THE INTER-AMERICAN
COMMISSION ON HUMAN RIGHTS BEFORE THE INTER-AMERICAN
COURT OF HUMAN RIGHTS**

**IN THE CASE OF THE MAYAGNA (SUMO) INDIGENOUS
COMMUNITY OF AWAS TIGNI
AGAINST THE REPUBLIC OF NICARAGUA
(Unofficial Translation)**

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I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter the “Commission” or the “Inter-American Commission”) has presented a petition to the Inter-American Court of Human Rights (hereinafter the “Court”) against the State of Nicaragua (hereinafter the “State” or the “Nicaraguan State”) with regard to the case of the Mayagna (Sumo) Indigenous Community of Awas Tingni (from now on, the “Community” or the “Awas Tingni Community”). The petition alleges that the Government has violated the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”) due to the lack of measures needed to guarantee the Community’s rights over its traditional lands, including the lack of procedures for demarcation or titling of land, and for the granting of a logging concession in those lands to the company Sol del Caribe, S. A. (hereinafter “SOLCARSA”). The petition also alleges that the State of Nicaragua has violated the American Convention in failing to guarantee an effective judicial remedy to respond to the Community’s claims over its traditional lands and natural resources.

2. After ruling against the preliminary objections brought by the State, the Court held a public hearing on the merits of the case. This hearing took place on November 16, 17 and 18, 2000 at the Court.¹ In the hearing, the Commission called eight witnesses and four experts. This testimony complemented the documentary proof submitted to the Court in the appendices to its original pleadings.² Furthermore, in the hearing the Court received testimony

¹ See Inter-Am.Ct., Case of Mayagna (Sumo) Community of Awas Tingni: Transcript of the public hearing on the merits, November 16, 17 and 18, 2000, at the Court (hereinafter “Transcript of the hearing on the merits.”) [reproduced in its entirety *supra* pp. 129-306].

² See Appendix C of the Petition of the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights in the case of the Mayagna (Sumo) Indigenous Community of Awas Tingni against the Republic of Nicaragua, June 4,

and documentation from a witness called by the Court itself.³ For its part, the State of Nicaragua did not present any witnesses or experts in the hearing, although it did offer some supposedly probative documents as appendices to its preliminary objections brief and to its response to the Commission's Petition.

3. The following are the final written arguments of the Inter-American Commission, which summarize the facts proven and the legal foundations for the conclusion that the Nicaraguan State has violated the American Convention in relation to the human rights of the members of the Awas Tingni Community.

II. PROVEN FACTS

4. The documentary and testimonial evidence submitted to the Court proves the facts upon which the petition in this case is based, and which amount to violations of the American Convention. The scarce and incomplete documentary evidence presented by the State does not refute the human rights violations alleged by the Commission, but rather tends to confirm those violations.

A. The existence and historical continuity of the Awas Tingni Community

5. The testimony of the witnesses Jaime Castillo, Charlie Mclean, and Wilfredo Mclean, members of the Community, and of the witnesses Dr. Theodore Macdonald and Dr. Galio Gurdián, both anthropologists with broad and direct knowledge of the indigenous communities of Nicaragua, confirmed that Awas Tingni is a Mayagna community, indigenous to the Atlantic Coast of Nicaragua, which has a defined membership and which maintains a traditional system of community organization and leadership closely connected with a territorial space and distinctive culture.

6. According to the census performed by the members of the Community in 1992, the Community had in that year a population of 629 people. The documentation from this census is found at Appendix C.13 of the Commission's Petition.⁴ The census document indicates the names of each of the

1998 (hereinafter "Commission's Petition"); Appendices of the Inter-American Commission on Human Rights responding to the preliminary objections filed by the State of Nicaragua with the Inter-American Court of Human Rights in the case of the Mayagna (Sumo) Indigenous Community of Awas Tingni, September 25, 1998 (hereinafter "Response to the IACtHR preliminary objections"); and the submission to the Court of numerous documents from the Commission through its letter of January 29, 2000 responding to the documents submitted by the witness Centeno.

³ See documents received by the Court through resolution of November 24, 2000.

⁴ The census documentation is an appendix to the *Request of the Mayagna*

members of the Community. Mr. Charlie Mclean, one of the leaders of Awas Tingni, testified that since that census was taken, the number of members of the Community has grown and that, according to the latest census performed by the Community, Awas Tingni now has 1016 members. Mr. Mclean himself participated in the taking of the last census.⁵

7. The State cites a census provided by the National Census and Statistics Institute, which indicates that the number of persons of the Community is 576,⁶ but the State indicates neither the date of the census nor the work upon which it is based. The witness called by the Court, Mr. Marco Centeno Caffarena, a State official originally proposed as a witness by the State, spoke of a 1995 census which put the “Mayagna Population on the Atlantic Coast” at 407.⁷ This inconsistency in the State’s statistics confirms the concern of the Commission that, for the indigenous peoples of America and of Nicaragua, official population censuses have been unreliable. The Community has kept its own census count because of this very concern. In the opinion of the Commission, the census taken by the Community is more reliable.

8. Details about the Community's history, organization, culture, land and resource tenure are found in the preliminary report on the ethnographic study by Dr. Macdonald, Appendix C.3 to the Commission's Petition.⁸ In his testimony before the Court, Dr. Macdonald explained that, after writing the preliminary report about his study, he continued his research into Awas Tingni with another visit to the Awas Tingni area and interviews with neighboring communities.⁹ Dr. Macdonald affirmed that his later research confirmed the conclusions in his preliminary report, and this confirmation has been documented in his final report written in 1999, and filed with the Court on January 29, 2001.¹⁰

Community of Awas Tingni to the Regional Counsel of the North Atlantic Autonomous Region for Official Recognition and Demarcation of the Community's Ancestral Lands, (Appendix C.13 to the Petition of the Commission).

⁵ Transcript of the hearing on the merits, *supra* note 1, p.23 [p. 144 *supra*].

⁶ Appendix 12 to the Reply of the Republic of Nicaragua to the Petition filed with the Inter-American Court of Human Rights in the Case of the Mayagna Community of Awas Tingni.

⁷ Transcript of the hearing on the merits, *supra* note 1, p. 196 [pp. 266-67 *supra*].

⁸ *Awas Tingni: An Ethnographic Study of the Community and its Territory – Preliminary Report* (1996) (Theodore Macdonald, principal researcher), Appendix C.3 to the Petition of the Commission (hereinafter “Macdonald Preliminary Report”).

⁹ Transcript of the hearing on the merits, *supra* note 1, pp. 45-46 [pp. 158-59 *supra*].

¹⁰ *Awas Tingni: An Ethnographic Study of the Community and its Territory – Report* (1999) (Theodore Macdonald, principal researcher), filed with the Court January 29, 2001 (hereinafter “Macdonald Final Report”).

9. The State has attempted to challenge Dr. Macdonald's study, but without introducing any evidence contradicting the facts and conclusions contained therein, and without having reviewed the final report. The witness called by the Court, Mr. Marco Centeno Caffarena, a State official originally proposed by the State, provided to the Court some documents written by Mr. Ramiro García Vásques, which purport to be a critical analysis of Dr. Macdonald's work.¹¹ As Dr. Macdonald and the witness Dr. Charles Hale have indicated, Mr. García's criticisms lack validity and ought to be rejected by the Court.¹² Above all, Mr. García Vásques is not qualified to evaluate the ethnographic work of Dr. Macdonald, nor to analyse the existence and historical roots of an indigenous community. Mr. García is not an anthropologist nor does he have experience with the indigenous peoples of the Atlantic Coast. Mr. García identifies himself as an archaeologist, but his *curriculum vitae* indicates that his only academic credential is a bachelor's degree in biology.

10. The expert witnesses Dr. Charles Hale and Dr. Rodolfo Stavenhagen, both well-reputed anthropologists who are qualified to comment on an ethnographic work, studied the methodology and conclusions of Dr. Macdonald and declared to the Court that Dr. Macdonald's conclusions are well founded according to accepted anthropological methodology.¹³

11. In his testimony before the Court, the witness Dr. Gurdián and the expert Dr. Hale, who are specialists with direct knowledge of the Miskito and Mayagna Communities of the Nicaraguan Atlantic Coast, confirmed that Awas Tingni is one of the communities descended from Mayagna indigenous groupings that have inhabited the area from time immemorial.¹⁴ As explained by Dr. Macdonald, Awas Tingni is of the Panamahka linguistic group, one of the sub-groups of the Mayagna ethnic group.¹⁵ Awas Tingni, like other indigenous

¹¹ See Ramiro García Vásques, *Ethnographic Opinion on the document written by Dr. Theodore Macdonald* (attached to the letter of Mr. Marco Centeno C. to Dr. Manuel Ventura, Secretary of the Court, November 21, 2000); Ramiro García Vásques, *Ethnographic considerations on the Sumo population, an ethnic group which settled in part of the North Atlantic autonomous territory, Nicaragua* (attached to the letter of Mr. Marco Centeno to Dr. Manuel Ventura, Secretary of the Court, November 21, 2000).

¹² See Dr. Theodore Macdonald, statement of December 26, 2000, responding to the ethnographic opinion of Mr. García Vásques (filed with the Court by the Commission on January 29, 2001); Dr. Charles Hale, Commentaries on "Ethnographic Opinion on the document written by Dr. Theodore Macdonald" by Ramiro García Vásques, Archaeologist (filed with the Court by the Commission on January 29, 2001).

¹³ Transcript of the hearing on the merits, *supra* note 1, pp. 73-74, 154 [pp. 178-79, 236-37 *supra*].

¹⁴ *Ibid.* pp. 104, 155 [pp. 203-4, 234 *supra*].

¹⁵ Macdonald Final Report, *supra* note 10, p. 3; Macdonald Preliminary Report, *supra* note 8, Appendix C.3 to the Commission's Petition, p.5.

communities of the region, resulted from the evolutionary process of social organization among the Mayagna. This process has been influenced by numerous factors, many of which are closely linked to historical encounters between the Mayagna and non-Mayagna peoples.¹⁶ However, within the typical scheme of development of indigenous peoples in the Americas as explained by the experts Stavenhagen and Hale, Awas Tingni is a community with its own internal leadership and organization that represents continuity with the historic Mayagna presence in the region.¹⁷

B. The Community's traditional land and natural resource tenure

12. The evidence before the Court has demonstrated conclusively that the Awas Tingni Community traditionally uses and possesses a territorial space, and that this space and the natural resources within it form crucial elements for the existence, culture, and continuity of the Community.¹⁸

13. As explained by the witness Charlie Mclean, leader of the Community, the area used and occupied by Community members and their forebearers is shown in the hand-drawn map made by Community members in 1991, a map created without assistance from any outsiders to the Community. Making reference to this map, which is found at Appendix C.1 to the Commission's Petition, Mr. Mclean described to the Court the way in which the Community has occupied and continues to occupy the land to live and carry out subsistence activities. Furthermore, he pointed out sites of religious and cultural importance and told the Court the history of the Community in relation to the indicated territory.¹⁹ The witness Jaime Castillo, another Community member and leader, told how he walks up to 15 days to reach the hunting grounds traditionally used by the Community.²⁰

14. Another map presented to the Court is the map in Appendix C.4 to the Commission's Petition. This map also represents the land used and

¹⁶ *Ibid.* pp. 5-9.

¹⁷ See *Ibid.* pp. 10-16, Transcript of the hearing on the merits, *supra* note 1, pp. 51 [pp. 162-63 *supra*] (testimony of Macdonald); 70-71, 75-76, 80 [pp. 175-176, 180-181, 184-185 *supra*] (statement of expert Stavenhagen); 151, 155 [pp. 234, 237-38 *supra*] (statement of expert Hale).

¹⁸ See Transcript of the hearing on the merits, *supra* note 1, pp. 72-73 (declaration by expert witness Dr. Stavenhagan on the importance of land to indigenous peoples generally) [pp. 177-78 *supra*].

¹⁹ Transcript of the hearing on the merits, *supra* note 1, pp. 24-27, 41-42 [pp. 146-48, 155-56 *supra*]; see also Appendix C.2 to the Commission's Petition (documents written by Charlie Mclean on the history of Awas Tingni and its territory).

²⁰ Transcript of the hearing on the merits, *supra* note 1, pp. 15-16 [p. 140 *supra*].

occupied by the Community, but is more precise and contains more land-use information than the map drawn by the Community in 1991. As Dr. Macdonald demonstrated to the Court in the hearing on the merits, both maps show the same geographical area. The more detailed map was created with the participation of Community members as part of the ethnographic study coordinated by Dr. Macdonald, using modern technology.²¹ The witness Dr. Gurdián and the expert witness Dr. Hale stated specifically that the methodology used to create this map is basically the same as that they used in the cartographic work that forms part of their "Diagnostic Study on Land Tenure of the Indigenous Communities of the Atlantic Coast," work commissioned by the State of Nicaragua.²²

15. The relationship between the map created by the Community in 1991, Appendix C.1 to the Commission's Petition, and the map created as part of Dr. Macdonald's study, Appendix C.4 to the Petition, demonstrates that the Community has been consistent in its delineation of its traditional territory and has not increased the area claimed, as the State insinuated without any evidence.²³

16. In the two above-mentioned maps, a place is marked named Tuburus, the site of the Community's settlement for innumerable past generations and where some people of the Community continue to reside. Also marked is the current main settlement of the Community. The Community arrived from Tuburus to their current site in the 1940s.²⁴

²¹ The methodology for the creation of this map was detailed in the Macdonald Preliminary Report, *supra* note 8, pp. 2-3, 17, and in the testimony of Macdonald before the Court, Transcript of the public hearing on the Merits, *supra* pp. 60-62 [pp. 159-60 *supra*].

²² *Ibid.* p. 106 (testimony of Dr. Gurdián); p. 154 (declaration of Dr. Hale).

²³ During the public hearing on the merits of the case, State representatives alleged that the Community's lawyers, Mr. Anaya and Ms. Acosta, had claimed 16,000 hectares from the State for the Community, a much smaller area than that shown on said maps. The Commission affirms that the State's allegations regarding Anaya and Acosta is false, and that State has not presented any evidence to prove its allegation. The State referred to a document attached to Appendix C-4 of the reply of the Commission to the State's preliminary objections. In this document appear the names of Anaya and Acosta, certifying that they went to the regional delegation of INRA in 1993; and below the names appear a reference to 16,000 hectares written by hand in different handwriting than that in which the names of Anaya and Acosta are written. The only probative value this document has is to establish that Anaya and Acosta visited the INRA delegation, which is the value attributed it by the Commission. The document gives no indication as to what the origin of the written reference of 16,000 hectares might be nor its significance. The Commission can affirm that this reference does not represent any claim made by Anaya or Acosta.

²⁴ See Transcript of the hearing on the merits, *supra* note 1, pp. 25-26, 38,39 [pp. 145-46, 153 *supra*] (testimony of the witness Mclean about Tuburus and its relationship with the current main site of Awas Tingni); pp. 47, 62-63 [pp. 159, 170-171 *supra*]; (testimony of the witness Macdonald); MacDonald Preliminary Report, *supra* note 8, pp. 6-9; Macdonald Final Report, *supra* note 10, pp. 15-17 (about Tuburus within the history of

17. The State uses the fact of the Community's movement to argue that Awas Tingni is a community of recent origin without a presence in the area prior to the 1940s, but the State's error is obvious.

18. The State's argument ignores the Community's history and the geography of their traditional land tenure. As can be appreciated from the maps appended to the Petition and the declarations of the witnesses Mclean and Macdonald, both Tuburus and the current site of the Community are within the wider area traditionally used and occupied by the Community. For various reasons, the majority of the Community left Tuburus to relocate in another part of their traditional lands, the site of the current settlement.²⁵ Rather than indicating a recent arrival by the Community in the area, this movement represents the historical continuity of the Mayagna in the area according to the usual movement patterns found among the indigenous peoples of the Atlantic Coast and of the Americas.²⁶

19. The witness Gurdíán and the expert witness Hale have confirmed the assertions of Community members who appeared as witnesses and of Dr. Macdonald's study: that the current patterns of land and resource tenure of the Awas Tingni Community represent the continuation of a territorial occupation of the same area by the Mayagna since time immemorial.²⁷ The Community maintains a cosmology that links their current land tenure with that of their ancestors, within a system of religious beliefs and practices. The nexus between the current and ancestral land use is maintained to a great extent through the identification of sacred places, including cemeteries where ancestors from various past generations are buried.²⁸

20. The documentary and testamentary evidence establishes that the Community uses and occupies its traditional lands according to customary norms typical of the indigenous peoples in the lowlands of America. Within this land tenure scheme, Awas Tingni's whole territory is considered to be possessed in a collective or communal form, while individuals and families of the Community

the Community).

²⁵ See Macdonald Preliminary Report, *supra* note 8, pp. 6-9; Macdonald Final report, *supra* note 10, pp. 15-17.

²⁶ See *Ibid.* pp. 4-20; Transcript of the public hearing on the Merits, *supra*, pp. 20-43 [pp. 142-56 *supra*] (testimony of the witness Mclean), p. 75 [pp. 180-81 *supra*] (statement of Dr. Stavenhagen), pp. 154-155 [pp. 237-38 *supra*] (statement of Dr. Hale).

²⁷ *Ibid.* pp. 154-156 [pp. 237-39 *supra*] (statement of expert witness Hale); p. 104 [p. 203-04 *supra*] (testimony of the witness Gurdíán).

²⁸ *Ibid.* pp. 25-28, 40-42 [pp. 145-47, 154-56 *supra*] (testimony of the witness Mclean); pp. 67-68 [pp. *supra*] (testimony of the witness Macdonald); Macdonald Preliminary Report, *supra* note 8, pp. 24-30; *supra* note 10, pp. 37-38.

enjoy subsidiary rights of use and occupation for their homes and agricultural areas. Further customary norms exist which regulate the transmission of these subsidiary rights that belong to individuals and families.²⁹

21. The State has provided no evidence contradicting the Commission's proof with regard to the Awas Tingni Community's land and resource tenure. Instead of presenting such evidence, the State argues that the Commission's proof is insufficient, basing this argument on incorrect criteria and mistaken interpretations of the facts, as is, for example, the State's interpretation of the current site of the Community. Thus, on the basis of the analysis of the biologist Mr. García Vásques,³⁰ the State argues that the evidence presented by the Commission has not proven the existence of "ancestrality" that ties the current Community of Awas Tingni to the lands it claims.

22. This argument of a supposed lack of ancestrality ought to be considered inadmissible by the Court, given that the State in the public hearing objected to any discussion by the witnesses and expert witnesses of the history of the Community's land tenure.

23. Even if admissible, the argument must be rejected as based on an overly narrow concept of ancestrality. For the State and Mr. García Vásques, one would have to prove the millennial existence of the Community in its current composition and its continuous past occupation of the same site for thousands of years without any movement. This curious notion of ancestrality has no place in the consideration of the facts relevant either to this case or in the assessment of the evidence offered by the Commission. Responding from the scientific point of view to the concept of ancestrality proffered by the State and Mr. García Vásques, the expert witness Dr. Hale says:

The author repeatedly confuses the two concepts [of ancestrality and traditional use], and also uses a peculiar definition of the concept of ancestrality. The author understands by ancestrality that the descendants of the human nucleus in question have been settled in the same site, permanently and in an immovable form from time immemorial. The definition utilizes such a rigid concept of ancestrality that it becomes historically impossible to fulfil and scientifically doubtful. All human nuclei migrate through history, either by their own initiative or as a result of external factors. No serious analyst of

²⁹ *Ibid.* pp. 17-24, 31-38; Transcript of the hearing on the merits, *supra* note 1, pp. 64-66 [pp. 171-72 *supra*] (testimony of the witness Macdonald); pp. 160-161 [pp. 241-42 *supra*] (statement of expert witness Hale); pp. 77-81 [pp. 181-85 *supra*] (statement of the expert witness Stavenhagen about indigenous land tenure in lowlands in general and about indigenous customary law relating to land).

³⁰ R. García V., *Ethnographic Opinion*, *supra*.

ancestrality assumes as a basic criterion that the human settlement must remain in the same site permanently and indefinitely. In any case, the concept used and approved in the legal regime of the Nicaraguan State is “traditional use.” This term also resonates much more in science, and means that a specific human group has a presence of long duration in a determined territory, and whose actual patterns of resource use in said territory demonstrate a persistence and basic continuity with their ancestral patterns. If the author in question were to adopt this definition of “traditional use,” his arguments disqualifying the traditional use of the Awas Tingni Community would fall of their own weight.³¹

24. Another State argument, which also avoids confronting the Commission’s evidence, is that the territorial claim of Awas Tingni conflicts with the legitimate rights of other communities. The State has incorrectly insinuated that the area claimed by Awas Tingni includes lands to which other communities have held title for some time. However, the State has presented no proof of any such titles falling within the area claimed by Awas Tingni, because none exist. It is true that Miskito communities claim lands within parts of the same area claimed by Awas Tingni, and that some of these Miskito Communities hold titles granted by the State some years ago. But the State is trying to obscure for the Court the clear distinction between lands *titled to* and lands *claimed by* the neighbouring Miskito communities. The lands titled to these Miskito communities are relatively small areas compared to the untitled lands claimed by them, and these titled areas do not fall within the area claimed by Awas Tingni.³²

25. Also proven is that the presence of the Awas Tingni Community and its Mayagna ancestors in the area is significantly antecedent to the presence of the Miskito communities. It is incontrovertible that the Miskito communities closest to Awas Tingni, those in the Tasba Raya grouping, did not arrive to settle in the area until the 1960s, after being forced to abandon their original settlements on the Río Coco.³³ With respect to the other Miskito communities of the Diez Comunidades (Ten Communities) grouping, Dr. Hale affirmed that they have been in their current settlement areas “for a long time, but with little interference into the Awas Tingni area.”³⁴ The fact that these Miskito communities have

³¹ C. Hale, Commentary on the ethnographic opinion of Mr. García V. *supra* note 12, pp. 1-2.

³² See Transcript of the hearing on the merits, *supra* note 1, p. 157 [p. 239 *supra*, “There are no titles, there are no titles to that area period. . . and there is no overlapping claim. . . So as far as a legal overlapping claim, there is none.”] (testimony of expert witness Hale affirming “there are no titles in this zone . . . there is no legal overlap”).

³³ *Ibid.* pp. 155-156 [pp. 237-38 *supra*] (statement of expert witness Hale on the Miskito communities of the Tasba Raya grouping).

³⁴ *Ibid.* p. 156 [p. 238 *supra*]. See also *Ibid.* p. 104 [pp. 203-04 *supra*] (testimony of Dr. Gurdián on the expansion of the Miskito communities of the littoral toward the

arrived to settle in areas bordering on the lands claimed by Awas Tingni, and now claim part of this same territory, is not sufficient to de-legitimize Awas Tingni's claim and the evidence upon which it is based. Much less does it justify the State's failure to recognize the interests of Awas Tingni in the area where they have lived, worked and developed for generations.

C. The repeated fruitless efforts of the Community to obtain demarcation of and title to its property

26. The Awas Tingni Community does not possess a formal title nor any other official State document evidencing recognition of any rights over the lands where they live and develop their subsistence and cultural activities. This situation has persisted, leaving the Community in a precarious position, despite the Community's repeated efforts to obtain demarcation of and paper title to their traditional lands. The facts indicate that the State has been negligent and arbitrary in the face of Awas Tingni's requests for titling.

27. After the filing of the petition in this case, the State has curiously insinuated that the Awas Tingni Community does in fact possess a paper title. In addition to being inconsistent with other arguments of the State that deny the Community enjoys any legitimate property rights, this insinuation lacks any basis in fact. The only evidence the State has offered in this regard are vague property registers that mention "the Sumo Indians of Tilba-Lupia" without any evidence that said Indians are related to the Awas Tingni Community or their traditional land tenure patterns.³⁵ The State also points to a contract for timber extraction between the MADENSA company and the Community, a contract nullified and replaced by a later one after the intervention of the World Wildlife

originally Mayagna area where Awas Tingni lies); Macdonald Preliminary Report, *supra* note 8, pp. 36-38; Macdonald Final Report, *supra* note 10, pp. 50-53 (on the arrival of Miskito communities to the area).

³⁵ The State appeared before the Court in the hearing on the merits arguing that the Community does in fact have title, pointing to copies of property registers presented to the Court by Mr. Marco Centeno in the hearing and later received by the Court. The property registers indicate the granting of some title deeds to "the Sumo Indians of TILBA-LUPIA" in 1917 for lands amounting to less than 4,000 hectares within the Prinzapolka District, which lies far to the south of the territory claimed by the Community and outlined by the Commission. It is difficult to understand what these deeds for much smaller areas outside of the area claimed by Awas Tingni have to do with the case at hand. The only evidence tying "the Sumos of Tilba-Lubia" to Awas Tingni is the fact that they are of the same ethnicity and the testimony of Jaime Castillo before the court, to the effect that at some point in history a few members of Tilba-Lupia joined Awas Tingni. Transcript of the hearing on the merits, *supra* note 1, pp. 13-14 [pp. 138-39 *supra*]. Even if the members of the Awas Tingni Community were the actual beneficiaries of those titles, it is obvious that Awas Tingni would remain without title to or other official recognition of their traditional communal lands.

Fund (WWF) (see paragraph 31, below). In this contract, drafted by MADENSA and signed by the leaders of Awas Tingni without the benefit of legal or technical advice, mention is made of a deed that evidences the Community's property rights over the concession area. As noted by the witnesses Mclean and Castillo, who were among those who signed the contract on behalf of the Community, they understood by this reference that which they have always maintained, that the Community is the legitimate owner of the area with the right to a deed.³⁶ If the State could demonstrate the existence of a written title corresponding to the reference in the contract with MADENSA, the Community would of course welcome it. But unfortunately, rather than facilitating the efforts of the Community to have a deed for their traditional lands, the State has resisted those efforts.

28. Since 1991, the Community has been requesting of the State the demarcation and titling of their traditional lands. The State has not had, neither does it have, an adequate or defined procedure for titling the communal lands of the indigenous communities of the Atlantic Coast.³⁷ Even Mr. Centeno Caffareno, the State official who supposedly holds the highest authority on the matter, effectively admitted this in his testimony before the Court.³⁸ Nevertheless, representatives of Awas Tingni have made various applications to State agencies with relevant authority, including the Nicaraguan Agrarian Reform Institute (INRA). This institution, which no longer exists, was named by the State as the governmental agency with power to grant deeds of title for indigenous communal lands.

29. The witness Charlie Mclean declared that he and other leaders of the Community attended INRA's regional offices on several occasions since 1991, and on one occasion the Community leaders went to INRA's central offices in Managua. During those visits to INRA the Community representatives requested a deed for their communal lands and provided INRA officials with the map of their territory drawn by the Community (Appendix C.1 to the

³⁶ *Ibid.* pp. 25-32 [pp. 145-49 *supra*] (testimony of the witness Charlie Mclean); pp. 7 and 13 [pp. 134, 138 *supra*] (testimony of the witness Jaime Castillo Felipe).

³⁷ *Ibid.* pp. 99-100 [pp. 200-01 *supra*] (testimony of the witness Dr. Gurdíán); pp. 115-117 [pp. 211-13 *supra*] (testimony of the witness Brooklyn Rivera); pp. 151-153 [pp. 234-36 *supra*] (testimony of the expert witness Hale); pp. 167-174 [pp. 247-53 *supra*] (statement of the expert witness Roque Roldán). See also Central American and Caribbean Research Council, General Diagnostic Study on Land Tenure, Final Report, pp. 392-398; General Framework, pp. 93-97 (hereinafter "Diagnostic Study on Tenure of Indigenous Land on the Atlantic Coast") (document requested of the State by the Court in its resolution of November 24, 2000).

³⁸ Transcript of the hearing on the merits, *supra* note 1, pp. 214-215 [pp. 280-81 *supra*] (testimony of the witness Centeno admitting that indigenous lands have not been titled since 1990).

Commission's Petition) and the documents written by Charlie Mclean about the Community's history (Appendix C.2 to the Commission's Petition).³⁹ Furthermore, the lawyers for the Community, Mr. Anaya and Ms. Acosta, interviewed INRA officials in 1993 with the same objective of attempting to advance the titling of Awas Tingni's communal lands. These steps taken by the Community with INRA are not only proven by the statements of the Community's representatives, but also are confirmed in the statements of INRA officials.⁴⁰

30. On no occasion did INRA officials indicate to the Community's representatives that the Community had to follow some specific procedure or apply to the State in some other manner. To the contrary, the responses of INRA officials demonstrated the lack of adequate criteria and political will to proceed with the demarcation or titling of Awas Tingni's communal lands.⁴¹ Therefore, the Community was never given a positive specific response that would have led to obtaining a deed of title.

31. Another effort by the Community to push the State to title their communal lands occurred in the context of their relationship with the Ministry of the Environment and Natural Resources (MARENA). The witness Guillermo Castilleja of the World Wildlife Fund (WWF) described the process that resulted in a tripartite agreement among the Community, MARENA, and the Maderas y Derivados de Nicaragua, S.A. (MADENSA) company. This agreement was signed in 1994 to create a framework for the sustainable harvesting of timber resources in an area including lands claimed by Awas Tingni. During this process, the Community insisted to MARENA the need for titling or other act of official recognition of their communal lands. As a result, a provision was included in the agreement in which MARENA committed to provisional recognition of the property rights of the Community within the area of timber harvesting, and to facilitate a process of obtaining a deed for the Community.⁴²

³⁹ *Ibid.* pp. 28-29; Affidavit of Charlie Mclean Cornelio dated August 30, 1998 (Appendix B-1 to the Commission's Reply to the State's Preliminary Objections). See also Affidavit of Jaime Castillo Felipe dated August 30, 1998 (Appendix B-2 to the Commission's Reply to the State's Preliminary Objections).

⁴⁰ Statement of Sidney Antonio P. dated August 30, 1998 (Annex C-1 to the Commission's Reply to the State's Preliminary Objections); Statement of Ramón Rayo Méndez dated August 29, 1998 (Appendix C-2 to the Commission's Reply to the State's Preliminary Objections); Statement of Miguel Taylor Ortez dated August 30, 1998 (Appendix C-3 to the Commission's Reply to the State's Preliminary Objections); Certification of Ramón Rayo Méndez dated August 30, 1998 and attachments (Appendix C-4 to the Commission's Reply to the State's Preliminary Objections).

⁴¹ See Transcript of the hearing on the merits, *supra* note 1, p. 29 [p. 148 *supra*]; statements of Mclean, Castillo, Taylor and Méndez, *supra*.

⁴² Transcript of the hearing on the merits, *supra* note 1, pp. 85-88 [pp. 189-92 *supra*] (testimony of the witness Castilleja).

However, as will be described, MARENA did not comply with this provision.

32. After the failed efforts before INRA and MARENA, and with the threat of an impending concession to the SOLCARSA Company to cut timber in Awas Tingni's traditional lands without any arrangement with the Community, the Community resorted directly to the regional governmental authorities. In March of 1996, the Community presented to the Regional Council of the North Atlantic Autonomous Region (RAAN), the maps they had made of their traditional lands, Dr. Macdonald's preliminary ethnographic report, a Community census, and other documents, together with a written petition for a process by which to obtain a deed of title.⁴³ In its petition, the Community proposed that an area to be demarcated in its favor, an area smaller than the whole of the territory historically used by the Community, and also specifically proposed the following:

- 1) - An evaluation of the ethnographic study presented by Awas Tingni (Appendix B); and the development of a supplementary study if the Council deems it necessary.
- 2) - A process of negotiation and agreement among Awas Tingni and the neighboring communities regarding the borders between their respective communal lands.
- 3) - The identification of state lands in the area, if any.
- 4) - The demarcation of Awas Tingni's communal lands.⁴⁴

33. The competency of the regional authority to act on the petitions of the indigenous communities with regard to their communal lands was affirmed by the witness called by the Court, Marco Centeno C., a State official with supposed knowledge of the subject.⁴⁵

34. The president of the Board of Directors of the RAAN Regional Council received the Community's written petition and promised to properly process it. Nevertheless no response to their petition was ever received by the Community. Instead of duly considering the petition, the Regional Council ignored it, and the following year, in October of 1997, endorsed the SOLCARSA concession without any consultation with the Community.⁴⁶

35. Among their continuous efforts to attempt to safeguard their

⁴³ See petition of the Mayagna Community of Awas Tingni to the North Atlantic Autonomous Region Regional Council for Official Recognition and Demarcation of the Ancestral Lands of the Community (Appendix C.13 to the Commission's Petition).

⁴⁴ *Ibid.*

⁴⁵ See Transcript of the hearing on the merits, *supra* note 1, p. 221 [p. 285 *supra*] (testimony of the witness Centeno responding to a the question by Judge Roux Rengifo).

⁴⁶ See *infra*, paragraph 43.

rights over the land and natural resources, the Community met with the President of the Republic, Dr. Arnoldo Alemán. The witness Wilfredo Mclean, another leader of the Community, testified about the meeting that he and other Community representatives had with President Alemán in February 1997. The Community representatives explained their opposition to the SOLCARSA concession to the president and asked for help in obtaining demarcation and titling of their communal lands. President Alemán's response was to arrange a meeting the same day with MARENA Minister Staadhagen and the other principal officials of MARENA and INRA interested in the issue. However, this meeting, as with numerous other meetings the Community had with State officials, did not result in any concrete act to the benefit of the Community.⁴⁷

D. The granting of the concession to the SOLCARSA company to log timber within the Community's traditional lands

36. Since the beginning of this case before the Inter-American Commission, and throughout all the stages of its proceeding before this Court, the fact has remained uncontested that in March 1996 the State granted a concession to the Sol de Caribe S.A. (SOLCARSA) company to log timber within the territory claimed by Awas Tingni and that it did so with no prior consultation or agreement with the Community. The granting of the concession to SOLCARSA demonstrates the precarious situation experienced by the Community without a deed of title or other specific official recognition of its traditional land and resource tenure.

37. The evidence presented by the Commission establishes that the majority of the area of the SOLCARSA concession lies within the territory that has been traditionally used and occupied by the Community. The site of the Community's historical settlement of Tuburus, still inhabited today and used by members of this Community, is located in that part of the concession where logging operations were planned to commence. The presence of the Community in other parts of the concession area is marked by cemeteries and other sites of cultural and religious significance, by fruit tree orchards and other cultivated areas maintained by Community members, and by secondary living sites. Furthermore, continuing the practices of their Mayagna ancestors, Community members utilize the greater part of the concession area for additional subsistence activities such as hunting and fishing.⁴⁸

⁴⁷ See Transcript of the hearing on the merits, *supra* note 1, pp. 136-39 [pp. 225-27 *supra*].

⁴⁸ See Appendices C.5, C.6, and C.7 of the Commission's Petition; Transcript of the hearing on the merits, *supra* note 1, pp. 31-32 [pp. 149-50 *supra*] (testimony of the witness Mclean), pp. 56-57 [pp. 165-66 *supra*] (testimony of the witness Macdonald).

38. The State not only granted the concession to SOLCARSA without having consulted the Community, it did so without investigating or taking into account the traditional indigenous land and resource tenure in the area.⁴⁹ This lack of recognition of the indigenous presence in the area was demonstrated in the concession contract between the State and SOLCARSA and in the management plan developed by the company and approved by the State to govern the logging operations.⁵⁰ None of these documents mention the traditional indigenous land and resource tenure in the area of the concession. The lack of recognition of the indigenous presence was also demonstrated in the multiple times the State rejected Awas Tingni's objections to the concession and refused to consider the evidence of their traditional land tenure in the area.

39. In taking not a single measure to protect the traditional land and resource uses of the Awas Tingni Community, the SOLCARSA concession endangered the Community, whose existence, culture, and continuity depend on those traditional land and natural resource uses.⁵¹ The danger and uncertainty of the Community was heightened by the lack of sufficient applicable environmental guarantees in the concession management plan, the demonstrated lack of will by SOLCARSA to adhere to the applicable environmental standards, and the demonstrated lack of State capacity or will to provide adequate monitoring of the logging operations.⁵²

E. The State's insistence in proceeding with logging operations under the SOLCARSA concession, despite repeated objections by the Community

40. The lack of recognition of indigenous traditional landholding within the SOLCARSA concession area was not merely negligent, but was and continues to be intentional.

41. From the moment the Community learned of the plans to grant the concession to SOLCARSA, the Community voiced their objection to the concession to relevant State agencies. These objections were clearly based on the Community's claim to the concession area. Together with their objection to the concession, the Community on several occasions presented evidence to the State

⁴⁹ *Ibid.* See Transcript of the hearing on the merits, *supra* note 1, p. 118 [p. 213 *supra*] (testimony of the witness Rivera).

⁵⁰ Appendices C.10 and C.21 to the Commission's Petition.

⁵¹ See Transcript of the public hearing on the merits, *supra*, pp. 72, 79 [pp. 176-77, 183-84 *supra*] (expert witness Stavenhagen on the negative effects on indigenous peoples of actions which remove them from their traditional lands).

⁵² See Commission's Petition, pp. 45-47 and Appendices; press clippings in Appendices C.32 and C.33 of the Commission's Petition.

of their traditional land and natural resource tenure within the concession area.⁵³

42. Instead of commencing a process of investigating the land tenure of Awas Tingni or other indigenous communities within the concession area, and adjusting its behavior according to its findings, the State insisted in continuing with its plans to grant the concession to SOLCARSA and begin logging operations. The State's attitude was manifest in the reaction of Mr. Milton Caldera, then Minister of MARENA, to the first written communication from the Community opposing the concession, a letter delivered months prior to the signing of the concession contract.⁵⁴ Minister Caldera never responded to this nor to later communications from the Community; he simply ignored the Community's claim and took the position that the entire concession area is state land and not land over which indigenous property rights exist.⁵⁵ This position was consolidated as state policy, despite the objections of one cabinet member of the then government, Brooklyn Rivera, and with this policy, the State proceeded to sign the concession contract.⁵⁶

43. Since signing the concession contract, the State has maintained the policy of ignoring evidence of traditional indigenous land tenure within the concession area. Even when the Supreme Court of Nicaragua found the SOLCARSA concession unconstitutional for lacking approval by the regional government, the State made a great effort to "amend" that defect without studying Awas Tingni's claim. MARENA officials and SOLCARSA agents (who in some cases were the same individuals), joined efforts to instigate the RAAN Regional Council to issue a resolution supporting the concession and to reject Awas Tingni's claim within the concession area.⁵⁷ There were also attempts to bribe members of the Regional Council.⁵⁸ Like MARENA and other State institutions,

⁵³ See Appendices C.8, C.9, C.11, C.13, C.14, C.15, C.16, C.17, C.18 to the Commission's Petition. Transcript of the hearing on the merits, *supra* note 1, pp. 136-139 [pp. 225-27 *supra*] (testimony of the witness Mclean).

⁵⁴ See Letter of Maria Luisa Acosta to Milton Caldera, Minister of MARENA, dated July 11, 1995 (Appendix C.8 to the Commission's Petition).

⁵⁵ This position was demonstrated by MARENA officials responsible for the forestry sector. See "It's Indians vs. Loggers in Nicaragua," *The New York Times*, Tuesday, June 25, 1998 (Appendix C.18 to the Commission's Petition) (citing Alejandro Lainez, director of ADFOREST-MARENA).

⁵⁶ Transcript of the hearing on the merits, *supra* note 1, pp. 117-118, 121 [pp. 213-16 *supra*] (testimony of the witness Brooklyn Rivera).

⁵⁷ *Ibid.* pp. 125-127 [pp. 218-20 *supra*] (testimony of witness Humberto Thompson); Letter from Alta Hooker Blandford, President of the RANN Regional Council, to Roberto Araquistain, General Forestry Director of MARENA, dated December 8, 1995 (Appendix C.23 to the Commission's Petition).

⁵⁸ Transcript of the hearing on the merits, *supra* note 1, pp. 126-127 [pp. 219-20 *supra*] (testimony of the witness Humberto Thompson).

the Regional council decided to ignore the evidence presented to them by Awas Tingni about the Community's territorial claim and, in its capacity as a State entity, gave its endorsement to the concession.⁵⁹

44. Even in the proceedings before the Inter-American Court in this case, the State has confirmed its position rejecting Awas Tingni's claim over the concession area and taking a negative stand toward any indication of the Community's traditional land and natural resource tenure within the concession area. It has done so without at any time indicating any evidence that would establish the illegitimacy of the Community's claim.

F. The ineffectiveness of judicial recourse

45. In response to the persistence of State officials in failing to recognize Awas Tingni's traditional land and natural resource tenure, the Community brought two actions for *amparo* (a remedy to protect rights) before national courts, but both were dismissed without adjudication on the merits. A third *amparo* action, brought at the request of the Community by a council member of the RAAN Regional Council did result in a judgment favorable to the Community's interests, but the State refused for a year to comply with the judgment.

1. The ineffectiveness of the first *amparo* action

46. The first action for *amparo* was brought in September 1995 against MARENA officials, to enjoin the granting of the concession to SOLCARSA and related activities that, according to the Community, violated their constitutional rights over their land and natural resources. The Community brought the action some weeks after having sent the letter to Minister Caldera protesting against the concession, which had not yet been granted. In the action, the Community sought a judicial order requiring the following of MARENA:

- 1) - To abstain from granting the concession to SOLCARSA;
- 2) - To require SOLCARSA agents to remove themselves from Awas Tingni's communal lands where they currently are advancing works in preparation for the commencement of logging;
- 3) - To commence a process of dialogue and negotiation with the Community of Awas Tingni if the Company continues to be interested in timber operations on Community lands.
- 4) - Any other remedy this Honorable Court finds just.⁶⁰

⁵⁹ *Ibid.* p. 127 [pp. 219-20 *supra*].

⁶⁰ Action for *Amparo* of the Mayagna (Sumo) Community of Awas Tingni,

47. The Appeals Tribunal determined that the action was inadmissible, under Article 51 of the *Amparo Law* in which consent to the contested act is presumed after 30 days of having knowledge of the impugned act. To demonstrate that the Community had knowledge of the SOLCARSA concession 30 days prior to bringing the action, the Tribunal cited the letter protesting it sent to Minister Caldera.⁶¹ Some days after the ruling of inadmissibility by the Appeal Tribunal, the Community filed an *amparo* action by the *de facto* procedure (*via de hecho*), asking the Supreme Court of Justice to review the decision of inadmissibility by the Appeals Tribunal.⁶² A year and a half later, after the concession had been granted, the Supreme Court ruled on the case in a brief statement, confirming the rejection of the *amparo* action.⁶³

2. The ineffectiveness of the second *amparo* action

48. The Community filed a second *amparo* action in November 1997 against members of the RAAN Regional Council who had voted to ratify the granting of the concession to SOLCARSA and against MARENA officials who were promoting the implementation of the concession. In this action, the Community moved against the council members for not having processed their request for titling of their communal lands and for having ratified the concession without regard to that request. Furthermore, the Community named MARENA officials for instigating the Council's insistence on ratification of the concession without consideration of the Community's position regarding their traditional land and resource tenure in the concession area. The statement of action requested the following relief from the court:

- 1) - To declare the SOLCARSA concession null and void, for having been granted and ratified through a process which ignored the rights and constitutional guarantees of the Awas Tingni Community and its members.
- 2) - To order the members of the Board of Directors of the Regional Council to process the request presented to the Board of Directors and to the Regional Council by the Awas Tingni Community in March 1996.
- 3) - To order MARENA officials not to move forward with the granting of a concession for the exploitation of natural resources in the area conceded to SOLCARSA, without having defined the land tenure in the area, and without

against MARENA officials, filed September 11, 1995, paragraph 38 (Appendix C.43 to the Commission's Petition).

⁶¹ Judgment of the Sixth Region Appeals Court, Civil Division, dated September 19, 1995 (Appendix C.44 to the Commission's Petition).

⁶² *De Facto* Action filed with the Honorable Supreme Court of Justice, dated September 21, 1995 (Appendix C.45 to the Commission's Petition).

⁶³ Supreme Court of Justice, Judgment No. 11 dated February 27, 1997 (Appendix C.46 to the Commission's Petition)

having come to an agreement with Awas Tingni and any other Community with a valid claim to communal lands in the area.⁶⁴

49. Almost one year after the Tribunal admitted the action, the Supreme Court dismissed the action without examining the merits. Once again, the Court ruled based on the time period found in Article 51 of the *Amparo* Law and its presumption of consent to the impugned act. Despite the contents of the pleadings in the action, the Court incorrectly considered the impugned act to be limited to the initial granting of the concession, which had occurred a year and a half prior to the filing of the action.⁶⁵ For the Supreme Court the action was time barred because the Community had knowledge of the concession for some time, as demonstrated by the “petitions of the Community regarding their concerns about their communal lands.”⁶⁶ But rather than dealing primarily with the granting of the concession by MARENA in 1996, this action dealt with later acts and omissions centering on the lack of a response to the Community’s territorial claim and the supposed ratification of the concession by the Regional Council in 1997, some days prior to the filing of the action.

50. The Supreme Court’s judgment in this second *amparo* action by the Community, judgment No. 163, was issued on October 14, 1998, after the Commission brought its petition to the Inter-American Court. The Commission attaches judgment No. 163 for the information of the Court, according to article 43 of the regulations of the Court, which permits the filing of proof of supervening acts, and under article 44 by which the Court may receive any evidence it considers useful.

3. The ineffectiveness of the *amparo* action brought by council members Thompson and Smith

51. A third *amparo* action was brought by Humberto Thompson and Alfonso Smith, members of the RAAN Regional Council, at the request of Community leaders,⁶⁷ during the period between the two actions mentioned above. Community representatives requested the assistance of council members Thompson and Smith in the days after the granting of the SOLCARSA concession by MARENA in March 1996, given that MARENA officials had ignored the Community and their first *amparo* action had failed to give results.

⁶⁴ Action for *Amparo* of the Awas Tingni Community, against members of the RAAN Regional Council and MARENA officials, filed November 7, 1997, paragraph 59.

⁶⁵ Supreme Court of Justice, Constitutional Division, Judgment No. 163 dated October 14, 1998 (Attached).

⁶⁶ *Ibid.* p. 9.

⁶⁷ Transcript of the hearing on the Merits, *supra* note 1, p. 125 [p. 218 *supra*] (testimony of witness Humberto Thompson).

52. On March 29, 1996, counsellors Thompson and Smith filed an *amparo* action against the Minister of MARENA and other officials of that institution for having signed and guaranteed the SOLCARSA concession without the prior approval of the full RAAN Regional Council as required by Article 181 of the Constitution. Almost one year later, on the same day the Supreme Court ruled against Awas Tingni's first *amparo* action, the Court ruled in favor of Thompson and Smith's action and declared the concession unconstitutional on the alleged grounds.⁶⁸ The Court's ruling was based on the procedural requirement in Article 181 of the Constitution and not in a determination of the property rights within the concession area.

53. Instead of complying with the judgment and declaring the SOLCARSA concession null and void, MARENA officials allowed SOLCARSA to continue its logging operations and sought a supposed ratification of the concession by the Regional Council with the objective of "rectifying" the constitutional defect. The achievement in October 1997 of a majority vote in the Regional council in favor of the concession, without any consideration of Awas Tingni's territorial claims, precipitated the Community's second *amparo* action, mentioned above.

54. MARENA's insistence in continuing the concession, despite the judgment declaring it unconstitutional, led council member Thompson to apply to the Supreme Court for an order of execution. On February 3, 1998, almost one year after the ruling, the Supreme Court issued the execution order, requesting the Head of State to order the Minister of MARENA to comply with the ruling. Only after this order involving the Head of State did MARENA cancel the concession.⁶⁹

55. By this time the Community had suffered for two years an operating logging concession that threatened their traditional land and natural resources. Furthermore, although the concession was cancelled by the State, this nullification was not based on an official recognition of Awas Tingni's traditional tenure, but rather was due to the constitutional requirement of consultation with the Regional Government. As expressed by the State's agent in the hearing on the Merits, the State continues to maintain the position that the area conceded to SOLCARSA is state land, ignoring all the evidence of the traditional tenure of Awas Tingni and other communities.⁷⁰ The Community's precarious situation persists, as the Community continues without a deed of title or other measures to

⁶⁸ Supreme Court of Justice, Judgment No. 12 dated February 27, 1997 (Appendix C.48 to the Petition).

⁶⁹ Supreme Court of Justice, Execution Order for Judgment No. 12, dated February 3, 1998 (Appendix C.49 to the Petition).

⁷⁰ Transcript of the hearing on the Merits, *supra* note 1, p. 232-236 [pp. 296-301 *supra*] (final arguments of the agent of the State).

protect their traditional land and natural resource tenure.

III. THE PROVEN FACTS ESTABLISH VIOLATIONS OF THE AMERICAN CONVENTION ON HUMAN RIGHTS.

56. On the facts outlined above and proven before the Commission and the Court, the State of Nicaragua is responsible for violations of the American Convention on Human Rights, in particular violations of articles 1, 2 and 21, the latter relating to property, and other provisions of the Convention related to the rights of indigenous peoples to their traditional lands. The State is also in violation of the right to judicial protection in article 25 of the Convention.⁷¹

57. The Inter-American Commission arrives at these substantive conclusions of law through an interpretation of the American Convention tailored to its principal objective, the protection of human rights.⁷² As noted by the Court, the faithful pursuit of this objective requires the Convention to be interpreted with a view to the obligations undertaken by the State under other international instruments and to the applicable contemporary principles of human rights,⁷³ which in this case include principles upholding the collective rights of indigenous peoples. The Convention itself indicates this interpretive methodology in article 29. Thus, the Commission rejects the State's limited and even retrogressive interpretation of the rights protected by the Convention with relation to a vulnerable indigenous community, and urges the Court to do the same and to accept the interpretation of the Convention put forth by the Commission.⁷⁴

58. At any rate, the State's response of May 6, 1998 to the Commission's report No. 27/98 in this case pursuant to article 50 of the Convention constitutes acceptance of responsibility and, therefore, according to the principle of *estoppel*, should invalidate every defense the State attempts to present. In its response, the State did not deny the Commission's conclusions, but rather communicated measures that it had supposedly taken or was going to take to follow the Commission's recommendations to remedy the violations noted. (The complete text of said response is found in paragraph 68 of the Commission's

⁷¹ See Commission's Petition, pp. 26-64.

⁷² Inter-Am Ct.H.R., Case of Viviana Gallardo, et al, Judgment of November 13, 1981, Series A. No. 101-81, para. 16.

⁷³ Inter-Am.Ct.H.R., "Other Treaties" subject to the consultative jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982, Series A. No. 1 (1982), paragraph 41.

⁷⁴ An excellent exposition of the methodology that ought to be followed in interpreting the Convention in this case is found in the *amicus curiae* brief written and filed with the Court by the International Human Rights Law Group and the Center for International Environmental Law, pp. 7-13.

Petition).

A. Violations of the right to property and the State's corresponding obligations

59. According to the facts presented, the Inter-American Commission affirms that (1) the Awas Tingni Community has rights over lands and natural resources that are property in the sense of article 21 of the Convention; and that (2) these rights have been violated both directly and in conjunction with Articles 1 and 2.

1. The existence of property rights protected by article 21 of the Convention

60. Article 21 of the Convention recognizes that “[e]veryone has the right to the use and enjoyment of his property.” Under indigenous practices and customs, international law, and Nicaraguan law, the Awas Tingni Community’s traditional use and possession of land and natural resources are “property.”

61. Substantively, article 21 protects the right to property. The concept of property includes a great variety of interests that people can have over tangible and intangible goods according to applicable norms or understandings from various sources.⁷⁵ With regard to land and natural resources, property is not limited to what is possessed under a formal title of exclusive domain. Within state legal systems, property rights exist, for example, through prescription and limited usufruct rights.⁷⁶

⁷⁵ *Diccionario Jurídico Mexicano* (Segunda Edición, Instituto de Investigaciones Jurídicas, Editorial Porrúa, 1988); book P-Z (*Propiedad*, José Antonio Marquez Gonzalez, p. 2600, ways to group and acquire property), (*Propiedad Comunal*, Beatiz Bernal and José Barragan Barraban, pp. 2603-2605, diverse types of property of the ancient Mexicans) Book I-O (*Methods of Acquisition*, Carmen García Mendieta and Jesús Rodríguez y Rodríguez, pp. 2145-2148, classification of methods of acquiring property); William R. Burdick, *The Principles of Roman Law and Their Relation to Modern Law*, Chapter XII, “The Law of Property” (Wm. W. Gaunt & Sons, Inc., 1989) p. 326 (property constituted by an unlimited grouping of rights whose transfer, even if of only some rights and not the whole, give a property right to the other).

⁷⁶ *Diccionario Jurídico Mexicano* supra note 75, (Segunda Edición, Instituto de Investigaciones Jurídicas, Editorial Porrúa, 1988); book P-Z (*Servidumbres*, José Antonio Marquez Gonzalez, pp. 2913-2915, classifying the personal usufructory right and commenting on easements generally “Although dismemberments of property presuppose examples of optimal exploitation of available resources, and their social value is indisputable.”); *Código Civil de Nicaragua* (1997) Art. 868 (“Prescription is a means of acquiring a right, to free oneself of a charge or obligation, through the passage of time and under the conditions determined by law.”)

62. It must be understood that the concept of property contained in article 21 has an autonomous meaning that is not limited by the property system formalized under state domestic law. This is the understanding of the European Court of Human Rights of the analogous concept of “possessions” in article 1 of Protocol No. 1 of the European Convention on Human Rights.⁷⁷

63. In the context of indigenous peoples or communities such as those of the Atlantic Coast of Nicaragua, traditional patterns of territorial use and occupation make up customary property systems. The Commission considers that the property rights created by indigenous practices and customary norms ought to be protected in the same manner as other forms of property, and therefore qualify as property rights protected by article 21 of the Convention, independently of what is stipulated in domestic law. Not to recognize property rights based in indigenous tradition is to go against the principle of article 1(1), that of non-discrimination in the application of the Convention.⁷⁸

64. Numerous international instruments and precedents affirm that indigenous peoples have the right to safeguard their traditional tenure over land and natural resources.⁷⁹ These international instruments and precedents, together with a pattern of relatively consistent developments at the domestic level in American countries among others, demonstrate the existence of a norm of customary international law in this regard, or at least a very advanced process in the creation of such a norm.⁸⁰ Furthermore, the relevant institutions of the United

⁷⁷ *Matos E Silva, Ltd v. Portugal* (1997) 24 EHRR 573. The Court declared that “the notion of ‘possessions’ in Article 1 of Protocol No. 1 has an autonomous meaning . . . In the present case the applicants’ unchallenged rights over the disputed land for almost a century and the revenue they derive from working it may qualify as “possessions” for the purposes of Article 1”. See also *Latridis v. Greece* (1999) — EHRR — Hudoc REF00000994, March 25, 1999 (affirming the interests relating to possession and functioning of a cinema for eleven years, although under domestic law there was a dispute over the title to the cinema.); *The Holy Monasteries v. Greece*, (1995) 20 EHRR 1, [1994] ECHR 13029/87 (recognizing property rights based in occupation for centuries).

⁷⁸ See Commission’s Petition, paragraphs 104-107. The principle of non-discrimination was appropriately applied by the Australian High Court to recognize what it called “Native title”, a property title based in the traditional land tenure of the aboriginal of that country. *Mabo v. Queensland* [No. 2] (1992), 175 C.L.R. 1 (Austl). The High Court qualified as discriminatory the doctrine previously applied that did not recognize indigenous traditions and customs as sources of property rights. *Ibid.*

⁷⁹ See Commission’s Petition, paragraphs 96-100, 104-117.

⁸⁰ The basis for concluding the existence of a norm of customary international law affirming indigenous peoples’ rights over their traditional lands can be found in the *amicus curiae* brief filed by the National Congress of American Indians in the present case, and in the following articles: Siegried Wiessner, “The Rights and Status of Indigenous Peoples: A Global and Comparative and International Legal Analysis”, 12 *Harvard Human Rights Journal* 57 (1999); S. James Anaya & Robert Williams, Jr. “The Protection of

Nations have interpreted the International Covenant on Civil and Political Rights, and the Convention Against All Forms of Racial Discrimination – both instruments ratified by Nicaragua – as sources of State obligations to protect the traditional land tenure of indigenous peoples.⁸¹ These elements of existing or emerging international law strengthen the legitimate interests of indigenous peoples in their traditional lands, and therefore make up understandings at the international level that are additional sources of property rights over these lands.

65. In the case of Awas Tingni, the existence of a customary land tenure system has been established within which the Community possesses rights over the land and natural resources collectively while individuals and families of the Community enjoy subsidiary rights.⁸² Awas Tingni's system is tied to a larger customary system of long duration among the indigenous communities of the Atlantic Coast.⁸³ Within these complementary customary systems, the Community is recognized to have collective rights over lands and natural resources (although the precise geographical extent of these rights and the exact nature of their co-existence with the rights of other Communities are not fixed; see paras. 71-73, *infra*). These customary rights of the Community, being affirmed by international law, are property rights protected by article 21 of the American Convention.

66. Although in the opinion of the Commission the concept of article 21 has an autonomous meaning not limited by the definitions of property in domestic law, in the present case the property rights asserted do have a basis in the law of the State, in addition to having origins in the indigenous tradition and being embraced by international law. Both the Political Constitution of Nicaragua and the Statute of Autonomy for the Atlantic Coast Regions recognize “communal forms of property” according to the traditional patterns of land and resource tenure of indigenous communities.⁸⁴

67. On the other hand, the fact that the juridical nature and geographic extent are not specifically identified by the State through a deed or other formal state act does not negate the existence of Awas Tingni's communal property rights. These property rights have their origin in the traditional land and

Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System,” 14 *Harvard Human Rights Journal* 33 (2001).

⁸¹ See Commission's Petition, paras. 113-117.

⁸² See *Ibid.* paras. 12-25.

⁸³ See Transcript of the hearing on the merits, *supra*, p. 151 [p. 234 *supra*] (statement of expert witness Hale); *Opinion on indigenous land tenure of the Atlantic coast, supra, General Framework*, pp. 121-129.

⁸⁴ See Political Constitution of Nicaragua, arts. 5, 89, 180; Statue of Autonomy for the Atlantic Coast Regions of Nicaragua, Law 28 of 1987, art. 36 (provisions cited and discussed in the Commission's Petition, paras. 93-95).

resource tenure, and therefore exist without state actions to define them.⁸⁵ The evidence introduced by the Commission and not contested by the State establishes that the rights belonging to the Community do indeed exist, based on indigenous tradition and custom. These traditional rights are affirmed within international law and Nicaraguan law, as is the obligation to guarantee them.⁸⁶ The affirmation of indigenous peoples' traditional property rights and the obligation to guarantee them would have little meaning if these rights were considered legally inoperative until they are specifically defined.

68. Thus, in a recent case, following the example of judicial authorities of other countries, the Supreme Court of Nicaragua affirmed the property rights of the indigenous community Rama Key on the basis of that community's traditional land tenure and the relevant constitutional provisions, even though this community, like Awas Tingni, did not enjoy formal title nor a state demarcation of their communal lands.⁸⁷ The Supreme Court ruled that the INRA regional delegate had violated the constitutional provisions protecting indigenous communal lands in granting permission to non-members of the Rama Key community to take possession of lands located within what the community had identified as their traditional communal lands.⁸⁸

⁸⁵ The well-known United Nations study, *The Study of the Problem of Discrimination Against Indigenous Populations* (vol. 5) E/CN.4/Sub.3/1986/7/Add.4, paras. 216, 217 (José Martínez Cobo, special rapporteur) notes that:

... immemorial possession should suffice to establish indigenous title to land, official recognition and subsequent registration ... As these rights are not "created" by legislation, neither should they be extinguished by unilateral acts . . .

Recognition here means acknowledgement of a *de facto* situation that provides a basis for the existence of a right. Official recognition and subsequent registration should follow as a matter of course, once possession and economic occupation are proved.

⁸⁶ See Commission's petition, paras. 96-112, (detailing relevant international instruments and precedents); Transcript of the hearing on the merits, *supra* note 1, p. 173 (statement of expert witness Roque Roldán affirming that indigenous traditional land tenure on the Atlantic Coast creates property rights within the Nicaraguan legal framework even without the existence of a formal deed).

⁸⁷ Supreme Court of Justice (Nicaragua), Judgment No. 123 of June 13, 2000. Cases of other national jurisdictions in which juridical validity has been given to indigenous land tenure without a deed or other formal State act are detailed in the *amicus curiae* briefs filed in the present case by the National Congress of American Indians and the Assembly of First Nations.

⁸⁸ The Supreme Court observed that normally within the Nicaraguan legal framework rights based on custom, such as traditional rights of communities over their lands, cannot supplant written laws and ordinances. However, the Court concluded that the effect of the constitutional provisions is to guarantee the traditional rights of indigenous communities and that these guarantees impose obligations on State agencies. According to

69. The judgment of the Supreme Court in the Rama Key case reflects, as do the relevant precedents from other jurisdictions, that evidence of the existence of traditional land and natural resource tenure gives rise to a presumption of the existence of indigenous property. According to the proof presented by the Commission, this presumption applies in the present case in Awas Tingni's favor with respect to the indicated geographical area, even though it is not established – nor is it necessary or appropriate to establish at the international level – the specific delineation of these property rights.

70. Without an adequate analysis of the evidence of Awas Tingni's traditional land tenure, and using incorrect criteria, the State takes the extreme position that Awas Tingni has no legitimate claim based on traditional or historic tenure. However, the principle of *estoppel* prevents the State from taking this position before the Court, because it contradicts the position the State has previously taken in its communications with the Inter-American Commission and the Community.⁸⁹ In the proceedings before the Commission, the State agreed to "fulfil the recommendations of the IACtHR with respect to establishing a procedure . . . that results in the demarcation and official recognition of Awas Tingni's territory."⁹⁰ Previously, as representative of the State, MARENA had signed a contract with the Community in which it explicitly recognized the

the Court:

In addition to the Constitutional principles mentioned above, which we have said constitute a guarantee to maintain and preserve the communal property system for the benefit of indigenous communities, Article 36 of the Autonomy Statute of the Atlantic Coast Regions known as Law 28, published in The Gazette of October thirty of nineteen hundred and eighty-seven says in relevant part: "*communal property includes the lands, waters and forests that have traditionally belonged to the Atlantic Coast communities and are subject to the following conditions: 1) communal lands are inalienable, cannot be donated, sold, charged nor seized and are imprescriptible.*" This description serves as an indicator to determine the level of protection extended to communal property and the State's interest in providing said constitutional level protection with the objective of preserving the communal land system and maintaining and developing the identity and culture of our indigenous people. In the face of these guarantees we must conclude that any other threatening or perturbing act against communal property is totally unfortunate and violates the guarantees our Constitution upholds in its articles 5, 130, 180, and 183.

Judgment No. 123, *supra* note 87.

⁸⁹ See Inter-Am.Ct.H.R., *Case of Neira Alegría and others*, Preliminary Objections, Judgment of December 11, 1991, (Series C) No. 13 (1994), para. 29 (affirming the principle of *estoppel*); Eur. Ct. H.R., *Stan Creek v. Greece* Series A, No.301-B, December 9, 1994, (1995) 19 EHRR 293, paras. 35-36 (affirming that the principle applies with respect to attitudes adopted within the international litigation itself and with respect to attitudes demonstrated within the domestic sphere).

⁹⁰ Response of the State of Nicaragua, dated May 6, 1998, to the recommendations of the Commission in its Report No. 27/98.

legitimacy of the Community's claim and made a commitment to "facilitate the definition of the communal lands and not discredit the territorial aspirations of the Community."⁹¹ Likewise, State representatives made similar affirmations in a meeting that was convened in March of 2000 presumably for the purposes of negotiation. The State called this meeting without the participation of the Inter-American Commission, in an attempt to instigate the Community to withdraw its complaint before the Inter-American system.⁹² The State cannot now deny that the Community has a legitimate claim.

71. In any case, the State has not presented any evidence whatsoever to overcome the presumption of the existence of communal property belonging to the Community. As has been noted above, the critiques made of the ethnographic study presented by the Commission have no validity and are not based in any evidence contradicting the facts established by the Commission.⁹³ Furthermore, the State's argument on the Community's lack of ancestrality is without basis in the facts or in the correct criteria. Indigenous property is based on *traditional* tenure, as recognized by international instruments and the laws of Nicaragua.⁹⁴ As the expert witnesses Dr. Rodolfo Stavenhagen and Dr. Charles Hale have explained, traditional tenure implies the land and resources held according to a system of social organization and identifiable customs linked to a historical continuity, but not necessarily linked to a single site or a single social structure over centuries.⁹⁵ The State's limited definition of ancestrality would leave most indigenous peoples of the Atlantic Coast and of the world without the possibility of claiming rights to their lands unless they already possess formal title.

⁹¹ Forestry Exploitation Agreement among the Awas Tingni Community, Maderas y Derivados de Nicaragua, S.A. (MADENSA), and the Ministry of the Environment and Natural Resources (MARENA), May 15, 1994, art. 3.2. See Transcript of the hearing on the merits, *supra* note 1, p. 88. [p. 192-93 *supra*] (testimony of Guillermo Castilleja affirming and describing this State commitment).

⁹² The details of this meeting are found in the letter of the Commission to the Court dated April 13, 2000, and its attachments.

⁹³ See *supra* paras. 9 and 23.

⁹⁴ See Convention (No. 169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries, art. 14.1 (affirming the property rights of indigenous peoples over the land they "traditionally occupy"); Draft United Nations Declaration on the Rights of Indigenous Peoples, art. 26, adopted by the Sub commission on the Prevention of Discrimination and Protection of Minorities, August 26, 1994, E/CN.4/Sub.2/1994/45, p. 105 (rights to lands, etc. that they "have traditionally possessed or occupied"); Autonomy Statute of the Atlantic Coast Regions of Nicaragua, *supra*, art. 36 ("Communal property consists of the lands that have traditionally belonged to the communities . . .").

⁹⁵ See Transcript of the hearing on the merits, *supra* note 1, pp. 75-76 [pp. 180-81 *supra*] (statement of expert witness Stavenhagen); C. Hale, Commentary on the ethnographic opinion of Sr. García V., *supra*, pp. 1-2.

72. The only evidence brought by the State that could be relevant to the identification of the Community's property rights within the area claimed is the evidence of claims by other communities over part of this area. However, the simple fact that such claims exist does not refute the existence of Awas Tingni's property rights within the area. There is no evidence that the claims of other communities on the area are superior to or incompatible with that of Awas Tingni. To the contrary, the presence in the area of the nearest of the other communities, those of Tasba Raya, began after that of Awas Tingni; in the case of the Diez Comunidades, these do not have nor have they had any effective presence in the area.⁹⁶ None of these other communities enjoys a formal title that extends over the area claimed by Awas Tingni; their claims over the area are subjective and the documentation of these claims by doctors Hale and Gurdíán does not refute the evidence on which Awas Tingni's claim is based.⁹⁷ These claims can only prove that Awas Tingni and these other communities traditionally share some lands, and that Awas Tingni's property rights are not exclusive over the entire claimed area. It is not necessary for Awas Tingni to establish an exclusive ownership of all the claimed land. The concept of property is not limited to exclusive ownership, but can also consist of a shared ownership or of rights to use and access, according to the customs that have developed among the indigenous communities of the Atlantic Coast.

73. As explained by the expert witness Dr. Hale, the existence of claims of two or more indigenous communities over the same area does not necessarily indicate the existence of conflict, but rather can represent traditional understandings about the shared use of the land. Such understandings and patterns of overlapping territorial use are common among the indigenous communities of the Atlantic Coasts and other parts of the world.⁹⁸ The study carried out by Dr. Hale and his colleagues under the auspices of the State, and supposedly filed with the Court in fulfilment of its resolution of November 24, 2000, makes the following observations:

Of the 29 maps arising from the Diagnostic study, only two lack overlaps with adjacent claims. These overlaps would be even greater in number if the universe of the Diagnostic had covered all of the communities of the Caribbean Coast of Nicaragua.

On the one hand, there are communities that, despite their numerous small, and in some cases serious intercommunal conflicts, have lived in peace among themselves for centuries. Especially in the cases of claims for larger blocks of land, which include extensive areas used for hunting, ecological reserve, or

⁹⁶ See *supra* para. 25 and notes.

⁹⁷ See *supra* para. 24 and notes.

⁹⁸ See Transcript of the hearing on the merits, *supra* note 1, p. 157, 161 [pp. 239, 242 *supra*]. See also *amicus curiae* brief of the National Congress of American Indians.

forest or agricultural reserves, the overlaps with adjacent blocks is the reality of how they have had to exercise their rights on communal lands. The conflicts seem to arise only when radical changes are made to the usage plans for these resources. For example, with the arrival of a company to extract wood or when some external entity insists that there must be a single dividing line between the property rights of two groups.⁹⁹

74. In the case of Awas Tingni, the Miskito communities that the State alleges are in conflict with the Community over the claimed land, have appeared formally before the Court, through an *amicus curiae* brief, to express their support for the Awas Tingni community to defend this land against the pretensions of the State.¹⁰⁰

75. In any case, the evidence establishes that the Awas Tingni possesses rights based on the traditional land and natural resource tenure within the claimed area. These rights are property rights protected by article 21 of the American Convention.

2. The violation of article 21 together with articles 1 and 2 of the Convention

76. Rather than being a weakness in the Commission's petition before the Court, the fact that the Community's property rights remain without specific definition constitutes an element of the State's international responsibility in the present case.

77. The existing evidence of traditional land and natural resource tenure, which justify a presumption of property rights with regard to them, mean that the State is obliged to investigate this evidence and take the administrative and legislative measures necessary to protect those corresponding property rights. This obligation is implicitly found in the affirmation of property rights in article 21 of the Convention, above all, when dealing with the traditional property of vulnerable indigenous communities like Awas Tingni,¹⁰¹ and is further based on the explicit requirements of articles 1 and 2 of affirmative state action to protect the rights in the Convention.¹⁰² The need for States to take affirmative measures

⁹⁹ *Diagnostic study on indigenous land tenure on the Atlantic Coast, supra, Executive Summary*, p. 36.

¹⁰⁰ See *amicus curiae* brief filed by Indigenous Organizations, Communities and Representatives of Nicaragua in the Case of the Mayagna (Sumo) Community of Awas Tingni, filed with the court on January 25, 1999 (among which are Karatá, the Diez Comunidades, and Tasba Raya).

¹⁰¹ See Transcript of the hearing on the merits, *supra* note 1, pp. 73, 78 [pp. 177-78, 182-83 *supra*] (statement of expert witness Stavenhagen on the importance of titling of land to indigenous peoples).

¹⁰² See Commission's Petition, pp. 38-39.

to identify and protect the rights of indigenous peoples with respect to their traditional lands has been pointed out in various international instruments and decisions.¹⁰³

78. In the present case, the lack of adequate measures to protect the Community's property rights has persisted, despite the various occasions on which the State has faced the evidence of the Community's traditional tenure of land and natural resources. The State has been not only negligent in ignoring this evidence for years, but has acted repeatedly with the intention of undermining the Community's claim, without having adequately investigated or analyzed the relevant facts.

79. Despite various requests by the Community, the State has not demarcated or titled their traditional land, nor has it taken other necessary measures to identify and protect their rights of use and occupation according to traditional patterns. Not only does there exist a lack of needed administrative measures in the particular case of Awas Tingni, there also exists a lack of an adequate legal framework to facilitate such administrative measures. The evidence demonstrates that this condition abounds.¹⁰⁴ Without the necessary measures to protect their communal property, the Community lives in a precarious situation and their capacity to develop themselves socially, economically, and culturally is impeded. This condition constitutes violations to the right to property (article 21 of the Convention) and the state obligations to take necessary (article 1(1)) and legislative (article 2) measures to give effect to this right.

80. The State cannot avoid its international responsibility because of the complexity of the matter, nor much less because the controversy is due to a generalized and long-standing situation. As the Court has noted, such considerations do not justify a lesser standard for determining whether a violation of the American Convention exists. Considerations such as these can only be relevant to judge the moral integrity of the State with regard to the implementation of measures to remedy the violation. It is obvious that too much time has passed since the State of Nicaragua has left the indigenous communities in a more than vulnerable position with respect to their traditional lands. For centuries the traditional indigenous land tenure has been threatened and without adequate protection, and for decades, if not centuries, the communities of the Atlantic coast

¹⁰³ See *Ibid: amicus curiae* brief of the National Congress of American Indians, pp. 26-40; Wiessner, *supra*; Anaya & Williams, *supra*.

¹⁰⁴ See Transcript of the hearing on the merits, *supra*, pp. 99-100 [pp. 200-01 *supra*] (testimony of witness Dr. Gurdíán); pp. 115-117 [pp. 211-13 *supra*] (testimony of witness Brooklyn Rivera); p. 151-153 [pp. 234-36 *supra*] (testimony of expert witness Hale); pp. 167-174 [pp. 247-253 *supra*] (statement of expert witness Roque Roldán). See also *Diagnostic study on indigenous land tenure on the Atlantic Coast, supra, Final Report*, pp. 392-398; *General Framework*, pp. 93-97, 138-151.

of Nicaragua have been demanding the demarcation and titling of their lands.¹⁰⁵ Even after the State of Nicaragua committed to protecting the communities' communal lands in its 1986 Constitution, an extended period has elapsed without the necessary protection for Awas Tingni and many other indigenous communities. The expert witness Roque Roldán, a lawyer who has closely studied the situation in Nicaragua, estimated that the creation of an adequate administrative framework, and the subsequent titling of lands to the indigenous lands within that framework, could have been done in "one, two, or three years" given the political will to do so.¹⁰⁶

81. The lack of adequate protections for Awas Tingni's communal property, and the consequent violation of the Convention, consists not only of the lack of demarcation and providing title. It also includes the absence of regulations that direct state agencies not to take actions that may undermine those rights. Without regulations of this type, State agencies have ignored the existence of property rights based on traditional tenure, and have followed a policy of treating as state land all lands without formal title even where it is traditionally used and occupied by indigenous communities. This policy, throughout history and in recent years, has resulted in various instances in which the State has made decisions prejudicial to the traditional land tenure of indigenous communities. Thus was the decision of the State agency MARENA to grant the logging concession to SOLCARSA without taking into account the traditional communal property lying within the concession area.

82. The SOLCARSA concession is a dramatic example of the precarious situation in which Awas Tingni lives without adequate measures to protect their communal property, a situation for which the State is responsible under articles 1, 2, and 21 of the Convention, as applied together.

83. Furthermore, the granting of the concession and the efforts of state functionaries to proceed with the planned forestry operations in themselves constitute an active violation of article 21 of the Convention. The Commission reserves the rights to present evidence on the resulting damage from the forestry operations authorized by the State within the lands claimed by Awas Tingni, during the damages phase of the case. But even without the physical damage resulting from the cutting of timber in the lands claimed by Awas Tingni, the concession and the State's related actions have constituted a violation of the right to property in article 21.

¹⁰⁵ *Diagnostic study on indigenous land tenure on the Atlantic Coast, General Framework*, *supra*, pp. 10-41; 112-120.

¹⁰⁶ Transcript of the hearing on the merits, *supra* note 1, pp. 171-172 [pp. 250-52 *supra*].

84. The granting of the concession without consideration for Awas Tingni's traditional land and natural resource tenure, plus the insistence of state officials on continuing with the forestry plans even after having been informed of the traditional tenure within the concession area, and added to this the general precarious situation already experienced by the Community without official recognition of their communal property, constituted an unjustified interference with the enjoyment of the right to property. For the Community, the SOLCARSA concession, even before timber cutting commenced, signified an elevated level of insecurity with regard to their cultural and subsistence ties with the land and natural resources. The planned forestry operations clearly implied restrictions on the uses the Community made of the land and forest resources, and the potential removal of the Community from that land. The State's insistence on proceeding with the forestry plans according to the terms of the concession required the Community to dedicate themselves for several years to confronting a conflict with the State, from a situation of disadvantage, to try to defend the Community's interests.

85. Furthermore, the concession prevented the Community from advancing in its efforts to achieve the definition and just recognition of their rights over the land and natural resources within the area. The uncontradicted evidence of the Commission indicates that the Community had a legitimate claim to official recognition of property rights over the concession area, although these property rights did not necessarily amount to exclusive ownership of the entire area. The Community's legitimate claim includes the claim to benefit from the forests delivered to SOLCARSA, especially in view of the Autonomy Statute of the Atlantic Coast Regions of Nicaragua, which specifically states that the communities' communal property includes the forests which have traditionally belonged to them.¹⁰⁷ By preventing this legitimate claim for recognition of property rights from moving forward, without any adequate study of the claim, the State unjustifiably interfered with important proprietary interests represented by the claim and denied due process to the Community.¹⁰⁸

86. This interference with Awas Tingni's enjoyment of their property rights, caused by the SOLCARSA concession, qualifies as a violation of article 21 of the American Convention. This interference is no less serious than the acts identified by the European Court of Human Rights as violations of the property right in article 1 of Protocol No. 1 to the European Convention on

¹⁰⁷ Autonomy Statute, *supra*, art. 36.

¹⁰⁸ National courts of various countries have recognized that a legitimate claim to a good, even when it is not perfected or accompanied by possession of that good, is a proprietary interest which merits the protection of due process. See, for example, *Goldberg v. Kelly*, 397 U.S. 254 (1970) (USA) (interest in the continuation of social security benefits).

Human Rights. For example, in the case of *Matos E. Silva, Lda. v. Portugal*,¹⁰⁹ the European Court examined the effect of the creation by Portugal of a nature reserve on the property right claimed jointly by some associated companies over a parcel of land that was included in the reserve. The Court held that the companies' claim, although contested by the State, was under sufficient conditions to constitute property within the meaning of article 1 of Protocol No. 1, and identified an unjustified interference with that property even though the companies retained possession of the land and continued to work it. The interference, and the consequent violation of article 1 of Protocol No. 1, was based on the uncertainty and precarious situation the establishment of the nature reserve had created for the companies with respect to their claimed property.¹¹⁰

87. According to article 21 of the American Convention, the enjoyment of property rights may be subordinated to the "social interest." But in this case there is no argument that some social interest existed in the granting of the concession to SOLCARSA, much less one that justifies interference with the proprietary interests the Community has in relation to the land and natural resources within the area of the concession. The impossibility of the existence of this social interest is demonstrated by the fact that the Supreme Court of Nicaragua declared the concession unconstitutional.¹¹¹

88. Although the SOLCARSA concession was finally cancelled by the State, the violation of the indigenous communal property rights it caused has not been completely remedied. Still lacking, in addition to compensation for moral and pecuniary damages, is the demarcation and titling of Awas Tingni's communal land and other appropriate measures to identify and guarantee the Community's rights to territorial use and occupation.

B. Violations of other rights affirmed by the American Convention related to indigenous traditional land

89. The ties maintained by the Awas Tingni Community with their traditional lands and natural resources are related to various rights affirmed by the American Convention in addition to the property right in article 21. For Community members, like members of other indigenous communities, communal land is the place of their ancestral past and current abode, as has been made clear by the evidence brought by the Commission. The subsistence of Community members depends on the activities they carry out within their traditional territory, and these subsistence activities form part of their culture and are intimately linked to family relationships and the social organization of the Community. The

¹⁰⁹ (1997) 24 EHRR 573.

¹¹⁰ *Id* paras. 72-79.

¹¹¹ See *supra* para. 52.

relationship of the Community with their traditional land has deep religious dimensions. The Community's existence itself depends on the territorial space it occupies in which it carries out various activities.¹¹²

90. As explained by the expert Stavenhagen, the individual and collective human rights of indigenous communities such as those of the Atlantic coast cannot be enjoyed without the maintenance of the relationship these communities have with their traditional lands.¹¹³ Important studies by the United Nations have agreed that, for indigenous peoples, land is generally a precondition for the enjoyment of their basic human rights.¹¹⁴

91. Given the nature of the relationship the Awas Tingni Community has with their traditional lands and natural resources, the maintenance of this relationship implicates the following rights contained in the Convention: the right to life (article 4), the right to honour and dignity (article 11), the right to conscience and religion (article 12) freedom of association (article 16), protection of the family (article 17), and of movement and residence (article 22).¹¹⁵ In ignoring and rejecting the territorial claim of the Community, and in granting a concession for large-scale logging operations within the Community's traditional lands without taking their legitimate interests into account, the State violated a combination of these rights.

92. Furthermore, in not responding to the repeated applications for the demarcation of their lands, and in not consulting with the Community prior to granting the concession to SOLCARSA, the State violated the right to participation in government affairs and the right to petition (article 23).

93. In interpreting the provisions of the American Convention relevant to the present case, it must be kept in mind, in accordance with article 29 of the Convention, the State's responsibility under other international conventions. Nicaragua is party to the International Covenant on Civil and Political Rights, which affirms various applicable rights, including the right to self-determination of people (article 1), rights to the family and private life (articles 17 and 23), and

¹¹² See *supra* paras. 12-20.

¹¹³ Transcript of the hearing on the merits, *supra* note 1, p. 79 [p. 183-84 *supra*].

¹¹⁴ See, for example, *Study on the problem of discrimination against indigenous populations (Vol. V)*, *supra*, paras. 197-233 (United Nations Study); U.N: Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Indigenous Peoples and their relationship to land: Second progress report on the working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*, E/CN.4/Sub.2/1999/18 (June 3, 1999) paras. 10-18.

¹¹⁵ A broad and precise discussion of the relationship several human rights affirmed by the American system to indigenous land is found in the *amicus curiae* brief presented to the Court by the Human Rights Law Group and the Center for International Environmental Law.

the right of minorities to cultural integrity (article 27). In the context of its evaluations and state reports and complaints under the Optional Protocol to the Covenant, the United Nations Human Rights Committee has interpreted each of these rights in favor of the interests of indigenous communities in lands and natural resources.¹¹⁶ The application of these interpretations leads to the conclusion that these rights, and consequently the Covenant itself, have been violated by the State in the present case. Furthermore, it is apparent that the State has violated its obligations as a party to the International Convention on the Elimination of All Forms of Racial Discrimination, according to the interpretation the United Nations Committee on the Elimination of Racial Discrimination has given the Convention with regard to indigenous traditional lands.¹¹⁷

C. Violation of the right to simple, prompt, and effective judicial recourse

94. Added to the State's international responsibility in the present case is its responsibility for violating the right to a simple, prompt and effective judicial remedy, a right affirmed in article 25 of the American Convention. On two occasions, the Awas Tingni Community attempted to obtain legal protection (*amparo*) from the national judicial authorities to protect their rights over their lands and natural resources, but both actions resulted in delayed and negative judgments.¹¹⁸ Another *amparo* action was brought by council members Thompson and Smith, at the request of the Community, to nullify the SOLCARSA concession. This action did result in a favorable judgment, but only after a prolonged time and the State refused to comply with the judgment until the passage of another prolonged period.¹¹⁹

95. Article 25 of the Convention declares the "right to a simple and prompt remedy or to any other effective remedy before judges or competent tribunals, that protects against acts which violate fundamental rights recognized

¹¹⁶ See H.R. Comm. Ominayak Chief of the Lubicon Lake Band v. Canada, communication No. 167-1984, A/45/40, Annex 9(A) (applying Article 27 to affirm rights over traditional lands); H.R. comm., Francis Hopu v. France, Communication No. 549/1993, CCPR/C/60/D/549/1993/Rev.1 (1997) (affirming the rights of an indigenous group over ancestral lands based on articles 17 and 23); *Concluding Observations of the Human Rights Committee*: Canada, CCPR/C/79/Add.105 (April 7, 1999) (applying art.1 – self-determination- in favor of indigenous peoples with respect to their lands and natural resources). A discussion of these and other precedents is found in the *amicus curiae* brief of the National Congress of American Indians. See also Wiessner, *supra*; Anaya & Williams, *supra*.

¹¹⁷ See CERD, *Indigenous Peoples: General Recom.* XXIII, CERD/C/Misc.13/Rev.4 (1997).

¹¹⁸ See *supra* paras. 46-50.

¹¹⁹ See *supra* paras. 54-55.

by the Constitution, the law or this Convention.” Related to this is the affirmation in article 8 that “[e]very person has the right to be heard, with due protections and within a reasonable period, by a competent, independent and impartial judge or tribunal . . . for the determination of his civil, labor, fiscal or any other rights and obligations.” The jurisprudence of the Inter-American Court has demonstrated the fundamental importance of a simple, prompt and effective remedy to protect human rights.¹²⁰ For indigenous peoples, access to an effective judicial remedy is of special importance to the enjoyment of their human rights, including their rights over lands and natural resources, given their normally vulnerable conditions for historic and current social reasons.¹²¹

96. In the present case, according to relevant legal criteria laid down by this Court and noted by the Commission in its petition, article 25 has been violated in three ways.¹²²

97. **Firstly, the unjustified delay in the proceedings.** In each of the Community’s attempts to resort to the protection of the courts within Nicaraguan jurisdiction, the Supreme Court of Justice delayed a year or more in rendering a decision: 17 months with the first action (from September 1995 to February 1997) and 12 months with the second (from November 1997 to November 1998).¹²³ The time lapse meant the Supreme Court infringed its own procedural law, which requires the Court to rule on an *amparo* action within 45 days.¹²⁴ It cannot be argued that the delay was due to the complexity of the case or of the procedure, or that it was due to the conduct of the petitioners. In both cases, the Supreme Court rejected the case for being supposedly time-barred, without examining the merits of the case, and this rejection was on the basis of information at its disposition from the beginning of the proceedings. With the delay of the Court in these two cases, the Community was denied a prompt remedy to protect themselves from violations of their land and natural resource rights.

98. **Secondly, the rejection of the Community’s actions based on inadequate procedural reasons without sufficient reasoning.** The Community’s two actions were rejected for supposedly being time barred, without any consideration of the merits of the claims made, based on illogical reasons which could only be expressed in judgments lacking reasoning. In the first case,

¹²⁰ See Commission’s Petition, paras. 154-172 (citing jurisprudence of the Court).

¹²¹ See *amicus curiae* brief of the National Congress of American Indians, pp. 47-50.

¹²² See Commission’s Petition, paras. 151-188. See also the relevant legal criteria noted in the *amicus curiae* brief of the National Congress of American Indians.

¹²³ See *supra* paras. 46-50.

¹²⁴ *Amparo Law*, Law No. 49 (Nicaragua), *La Gaceta* No. 241 (1888).

the time used to arrive at the presumption of consent to the SOLCARSA concession was calculated by reference to a letter objecting to that concession, with the resulting conclusion that the action against the concession was time-barred; and, in the second case, the time was counted from the submission of earlier petitions to protect their communal lands, even though the impugned acts were the persistent failure to consider those very petitions.¹²⁵ These curious judgments declaring the actions time-barred are framed in conclusory language, without adequate reasoning demonstrating a precise consideration of what is impugned by the actions. The first action challenged the procedures that led to the granting of the SOLCARSA concession, at a time when those procedures were in process and *before* the concession was granted; even so, the effort to stop the concession was summarily declared to be too late.¹²⁶ In the second action, the Community denounced the subsequent ratification of the concession by the RAAN Regional Council and MARENA's participation in that ratification; and additionally denounced the fact that the Regional Council had not processed their application for title.¹²⁷ This *amparo* action was clearly filed within the legal limit of 30 days of the act of ratification by the Regional Council, and the lack of processing of the application for title was a continuing condition.¹²⁸ Despite this, in its judgment the Court considered the impugned act to be simply the granting of the concession by MARENA to SOLCARSA, something which had occurred more than a year prior, and something of which the Community had knowledge as proven by their letter of more than a year prior.¹²⁹ The dismissal of the *amparo* actions on these grounds, without adequate reasoning, denied the Community a simple, adequate and effective judicial remedy with regard to its efforts against the SOLCARSA concession and also with regard to their efforts to achieve the demarcation and titling of their communal lands.

99. Thirdly, the lack of compliance with the judgment declaring the SOLCARSA concession unconstitutional. Although the two *amparo* actions filed directly by the Community failed before the national tribunals, the Supreme Court ruled in favor of an *amparo* action filed by council members Thompson and Smith at the request of the Community. The judgment on the action filed by Thompson and Smith established the unconstitutionality of the SOLCARSA concession based on the requirement of prior approval by the Regional Council in Article 181 of the Constitution of Nicaragua, and not on the

¹²⁵ See *supra* paras. 47 and 49.

¹²⁶ See Commission's Petition, paras. 158-162 and notes.

¹²⁷ *Amparo Action of the Mayagna Community of Awas Tingni, against members of the RAAN Regional Council and MARENA officials, filed November 7, 1997* (cited in para. 48 *supra*).

¹²⁸ See *supra* paras. 43-48 and notes.

¹²⁹ Supreme Court of Justice, Constitutional Division, judgment No. 163 of October 14, 1998, P. 9 (Attached).

grounds of the Awas Tingni Community's territorial rights. However, the judgment was clearly favorable for Awas Tingni. But the benefit of the judgment anticipated by Awas Tingni and other indigenous communities was denied when the State persisted for more than a year in failing to comply with the judgment. In not complying with the judgment, the State prevented the effectiveness of the judicial remedy, thus causing an additional violation of article 25 of the American Convention.¹³⁰

100. The unfortunate experience of the Awas Tingni Community before the tribunals of the State indicates the existence of a general condition of great disadvantage the indigenous communities of Nicaragua have suffered before the judicial institutions of the country. As explained by the expert witness Lottie Cunningham, access to justice for Atlantic Coast indigenous communities has been little to non-existent. Added to a situation of weak judicial institutions that affect all the citizens of the country, are the conditions that particularly affect indigenous communities in this regard. These conditions include the lack of knowledge by judges of the particularities of indigenous peoples and their collective rights.¹³¹

101. It is not surprising that the Supreme Court avoided ruling on the traditional territorial rights of the Awas Tingni Community. When the Court finally declared the SOLCARSA concession unconstitutional, it did so on the basis of a procedural rule that did not touch the issue of indigenous property. Only once has the Supreme Court of Nicaragua ruled on the merits of a claim based on the constitutional guarantee of indigenous communal property: in the case of the Rama Key community cited above.¹³² But this judgment was only handed down after the present case had been brought to the Inter-American Court and had prompted an increased level of international scrutiny on the behavior of Nicaraguan courts toward indigenous peoples. Although the judgment of the Supreme Court of Nicaragua in the Rama Key case is a favorable development, the general problem of the lack of access to justice persists for the country's indigenous peoples, and the fact persists that in the concrete case of Awas Tingni, the Community has suffered from a lack of a simple, prompt and effective remedy.

V. CONCLUSION

102. The facts proven in the present case demonstrate a pattern of acts and omissions in which the State has perpetuated the sad history of denying

¹³⁰ See Commission's Petition, paras. 173-188 and notes.

¹³¹ See Transcript of the hearing on the merits, *supra* note 1, pp. 176-178, 185-188 [pp. 254-56, 259-262 *supra*] (statement of the expert witness Lottie Cunningham).

¹³² See *supra* para. 68.

the presence of indigenous peoples and their own forms of property. And now the State attempts to defend itself with the same political and legal concepts that have historically served to justify this denial, such as the concept of the need to establish a fixed settlement, the preference for intensive uses of land and natural resources, and the presumption that land not titled by the state is state land despite indigenous presence.

103. Fortunately, in the modern era the international community has rejected those concepts with their colonial roots, and the Inter-American Commission on Human Rights also rejects them in recognizing and defending Awas Tingni's legitimate rights over the land they have traditionally used and occupied.

104. Therefore, the Commission concludes that the State of Nicaragua has not fulfilled its obligations under the American Convention on Human Rights. The State has refused to act with due diligence to demarcate the communal lands of the Awas Tingni Community; neither has it taken effective measures to ensure the Community's property rights according to their traditional land and natural resource tenure. This omission of the State constitutes a violation of articles 1, 2, and 21 of the Convention, which together establish the right to said effective measures. articles 1 and 2 oblige the State to take the necessary measures to implement the rights contained in the Convention, and article 21 reaffirms the right to property.

105. The State of Nicaragua is responsible for actively violating the right to property in article 21, in granting a concession to the SOLCARSA Company to carry out, on lands used and occupied by Awas Tingni, road construction works and timber exploitation, without even consulting with the Community.

106. The proven facts establish the responsibility of the state for violations of other rights affirmed in the American Convention related to indigenous traditional land tenure. By its acts and omissions outlined here, the State has denied the Community and its members the full enjoyment of their rights to life (article 4), the right to honor and dignity (article 11), freedom of conscience and religion (article 12) freedom of association (article 16), protection of the family (article 17), the right to freedom of movement and residence (article 22), and the right to participate in government affairs and the right to petition (article 23). In ignoring and rejecting the Community's territorial claim, and in granting a concession for large-scale forestry operations in the Community's traditional territory without taking into account their legitimate interests, the State violated a combination of these rights.

107. Finally, the Commission concludes that the State of Nicaragua

did not provide an effective judicial remedy to respond to the claims of the Community regarding their land and natural resource rights, in violation of article 25 of the Convention.

108. For these reasons, the Commission respectfully requests the Honorable Court to declare that the State of Nicaragua violated the American Convention to the prejudice of the Awas Tingni Community and its members and, as a consequence of these violations, the Court must determine the appropriate reparations in due course.

Appendix – Judgment No. 163 of the Supreme Court of Justice, dated October 14, 1998, rejecting the *amparo* action filed by the Awas Tingni Community against State agencies.